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91-1187

Supreme Court, U.S.
FILED
NOV 21 1991
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN EDWARD HOOPER,

Petitioner,

versus

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT
AND
ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Petitioner was denied his rights of confrontation as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution by the ruling of the Trial Court preventing the Petitioner from cross examining the State's witnesses, Stephanie Milam and Michelle Lucas to determine whether the fact that they had been victims of sexual abuse would bias their testimony against the Appellant who was charged with rape in the alleged sexual abuse of his daughter.

TABLE OF CONTENTS

PAGE

Question Presented i

Table of Cases iii

Statutes and Rules Cited iv

Opinion Below 2

Jurisdiction 4

Constitutional and Statutory Provisions 4

Statement of the Case 5

Reasons for Granting the Writ 35

Argument 36

Conclusion 62

Appendix 1a

TABLE OF CASES

PAGE

Baker v. State, 568 So.2d 374 (Ala.Crim.App. 1990) 52

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 35

Chapman v. California, 386 U.S. 18, 18 S.Ct. 824, 17 L.Ed.2d 705 (1967) 47,48

Coy v. Iowa, ___U.S.___, 108 S.Ct. 2798, 2803, 101 L.Ed.2d 857 (1988) 61

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) 35,39,40, 44,45,46, 51

Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) 35,48,49, 53,54,56

Douglas v. Alabama, 380 U.S. 415-418, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965) 40

Moody v. State, 495 So.2d 104 (Ala. Crim.App. 1986) 50,51,52

Olden v. Kentucky, ___U.S.___, 109 S.Ct. 480, ___L.Ed.2d___ (1988) 46,47,54, 55,56,59

Page v. State, 487 So.2d 999 (Ala. Crim.App. 1986) 49

Pennsylvania v. Ritchie, 480 U.S. 39, 60, 107 S.Ct. 989, 1003, 94 L.Ed.2d 40 (1987) 61

Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) 39

Proctor v. State, 331 So.2d 828 (Ala.Crim.App. 1976) 50

STATUTES AND RULES CITED

J.Wigmore Evidence, Section 1395, p. 123 (3rd Ed. 1940) 40

J.Wigmore Evidence, Section 940, p. 775 (Chadbourne rev. 1970) 45

United States Constitution, Fifth Amendment 9

United States Constitution, Sixth Amendment 4,5,35, 39,59,63

United States Constitution, Fourteenth Amendment 4,5,9, 59,63

28, U.S.C. Section 1257(3) 4

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Petitioner, John Edward Hooper, respectfully prays that a writ of certiorari issue to review the judgment of the Alabama Supreme Court and the

Alabama Court of Criminal Appeals, whereby substantial constitutional issues by Petitioner were not answered by either of the said courts, even though timely raised.

OPINION BELOW

The ruling by the Alabama Court of Criminal Appeals as to the original appeal filed on January 30, 1990 (Third Division, Number 91) is set forth infra in Appendix 1a.

The ruling by the Alabama Supreme Court reversing the decision of the Alabama Court of Criminal Appeals and affirming the Circuit Court of Escambia County, Alabama on December 14, 1990, is set forth infra in Appendix 1b.

The denial of Petitioner's Application for Rehearing by the Alabama Supreme Court on February 8, 1991, is set forth infra in Appendix 1c.

The order by the Supreme Court of the United States on June 24, 1991, denying Petitioner's Petition for Writ of Certiorari on issues other than those raised in this petition is set forth infra in Appendix 1d.

The opinion by the Alabama Court of Criminal Appeals on March 29, 1991, addressing those issues raised in Petitioner's initial brief, but not addressed in its opinion of January 30, 1990, including the issue made the basis of this petition is set forth infra in Appendix 1e.

The order by the Alabama Court of Criminal Appeals overruling and denying Petitioner's Application for Rehearing on May 17, 1991, is set forth infra in Appendix 1f.

The denial by the Supreme Court of Alabama of Petitioner's Writ of

Certiorari on August 23, 1991, is set forth infra in Appendix lg.

JURISDICTION

The Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. Section 1257(3) in that the rulings by the Alabama Court of Criminal Appeals and the Alabama Supreme Court denied him the right of confrontation of witnesses guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution; hence Petitioner's Application to this Honorable Court to review the orders of the Appellate Courts of the State of Alabama in this cause.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Sixth and Fourtheenth Amendments of the United States Constitution.

The Sixth Amendement of the United

States Constitution provides, in part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.

The Fourteenth Amendment of the United States Constitution, in pertinent parts, provides as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state ... deprive any person of life, liberty or property, without due process of law.

STATEMENT OF THE CASE

Petitioner, a former State Trooper, was indicted in a two count Indictment by the Spring Term of the Escambia County Grand Jury in 1985. He was duly arraigned on July 12, 1985, and entered

a plea of not guilty.

Petitoner was first tried and convicted on September 17, 1985. This conviction was appealed to the Alabama Court of Criminal Appeals. On October 28, 1986, that court reversed and remanded Petitioner's conviction because of improper cross-examination of character witnesses by the Honorable Don Valeska, Assistant Attorney General.

On September 16, 1988, the Petitioner was again tried by jury and convicted of two counts of second degree rape. At that time, sentence was deferred and on November 2, 1988, the Honorable Bradley E. Byrne announced judgment of sentence on Petitioner as follows:

> Accordingly, I sentence you pursuant to the split sentence statute to 5 years in the State Penitentiary on your conviction under Count I, and I sentence you pursuant to the split sentence statute to 5 years on your conviction on Count 2; 5 years, that will be 5

years in the State Penitentiary. These sentences are to run concurrently.

Now, I would be unrealistic if I did not expect this case to be appealed based upon the way this case progressed and some very novel issues that were raised at trial that this Court had to deal with, therefore, I am not going to make a determination at this time as to how this sentence should be split, or make a determination as to probation. I am going to reserve all of those questions, all of those issues for determination at a later time once this case has been looked at by the appellate courts of this state, and if it is affirmed then I will make a determination or if no appeal is taken then I will make a determination at that time as to how this sentence should be served, whether probation should be granted, and exactly how this sentence should be split.

You will also be required to pay court costs in these cases and the sum of $250.00 to the Crime Victim's Compensation Assessment.

On December 6, 1988, Petitioner filed a Motion for Judgment of Acquittal and Motion for New Trial. Both motions were subsequently overruled and denied by the Trial Court on January 23, 1989.

At the time of sentencing on November 2, 1988, Petitioner gave oral notice of appeal and subsequently on January 30, 1989, filed further written Notice of Appeal in the Alabama Court of Criminal Appeals. The Alabama Court of Criminal Appeals released an opinion on March 30, 1990 reversing Petitioner's conviction and remanding the case back with an order to the Trial Court to enter a judgment of acquittal for the Petitioner. The State filed an Application for Rehearing on April 16, 1990, which was denied on May 11, 1990.

Thereafter, on May 25, 1990, the State petitioned the Alabama Supreme Court for a writ of certiorari to the Alabama Court of Criminal Appeals. The Alabama Supreme Court granted the writ of certiorari on August 27, 1990. On December 14, 1990, the Alabama Supreme

Court issued an opinion reversing the Court of Criminal Appeals.

Petitioner subsequently filed an Application for Rehearing in the Alabama Supreme Court which was denied on February 8, 1991. The Petitioner thereafter petitioned the United States Supreme Court for a writ of certiorari on the question of "whether the Alabama Supreme Court can alter a rule of evidence and apply the ruling retroactively to supply the necessary evidence to convict the Petitioner without transgressing the prohibition against ex post facto laws contained in Article I of the United States Constitution or the due process clause contained in the Fifth and Fourteenth Amendments to the United States Constitution." On June 24. 1991, the Supreme Court of the United States

denied this petition without opinion.

In the interim, the Alabama Court of Criminal Appeals issued a second opinion addressing those seven issues earlier raised by the Petitioner, but affirming the Petitioner's conviction on March 29, 1991. The Court of Criminal Appeals likewise overruled and denied Petitioner's Application for Rehearing on May 17, 1991.

The Petititoner filed a petition for writ of certiorari in the Alabama Supreme Court on those issued contained in the Court of Criminal Appeals' opinion of March 29, 1991. The Supreme Court of Alabama denied this petition on August 23, 1991.

Hence, this Petition for Writ of Certiorari.

The Petitioner was tried by a jury on two charges of Second Degree Rape, in

the Circuit Court of Escambia County, The Honorable Bradley E. Byrne, presiding, during the week of September 12-16, 1988. On September 6, 1988, a pre-trial hearing was held in which the State called Josephine Bahm to establish that Kimberly Hooper, the prosecuting witness, was recanting her rape allegations against her father, the Petitioner.

A jury was struck on September 12, 1988 and the trial began on September 14. The first witness, Kimberly Hooper, called as the Court's witness, denied on direct examination by the Court, the charges contained in the indictment. From pages R-124-125 of the transcript:

> Q. (THE COURT): Did John Edward Hooper engage in sexual intercourse with you on or about September 7, 1984.
>
> A. No, sir.
>
> Q. Did John Edward Hooper engage in

sexual intercourse with you on or about December 13, 1984?

A. No, sir. (R-124-125).

The Court then permitted the State to cross-examine the witness. Assistant Attorney General Don Valeska cross-examined Kimberly Hooper primarily by impeaching her with inconsistent testimony she had given at Appellant's first trial. In the course of this cross-examination, Kimberly, in her prior testimony, accused her father, the Petitioner, of raping her on the dates in question (R-131-132).

Also, Ms. Hooper identified three pornographic tapes offered by the State for identification purposes as State's Exhibits 1A, 2A and 3A. She testified that she had viewed these tapes at her home by herself. However, the State impeached her with her prior testimony

in which she stated that the Appellant had forced her to view them with him after which they usually had sexual intercourse (R-150-151).

Kimberly testified that she told two of her friends at school that her father had been sexually abusing her. These were Tyra Thomley and Michelle Lucas (R-178-179). She was then impeached with her prior testimony wherein she stated that she had also told Stephanie Milam and Ms. Carol Middleton, a school counselor. ~~Ms.~~ Hooper was also questioned concerning an incident at her house involving Stephanie Milam. From page R-201 of the record:

> Q. Did you ever at anytime prior to September 16, 1985, when you testified right here, did you ever watch those films with Stephanie Milam and your father at your house in Atmore, Alabama?
>
> A. No, sir.
>
> Q. At anytime ever?

A. Stephanie has never been in my house.

and on page R-202:

Q. -- did you ever have an occasion to watch on the satellite dish with Stephanie Milam and your father X-rated pornographic TV shows?

MR. HARDEN: Judge, if it please the Court, we object and move for a mistrial on the grounds that's totally irrelevant, and has nothing to do with the charges in this case.

MR. VALESKA: I submit to the court that it does.

THE COURT: I overrule the objection.

MR. HARDEN: Except.

MR. OWENS: Except.

A. No, sir.

On cross-examination by the Petitioner, Kimberly Hooper again denied that her father had raped her. According to Kimberly, she told two of her friends that her father had raped her because she did not like them telling her how lucky she was to have a

father who was a state trooper. She further stated that she had attempted to recant her story prior to the first trial but had been threatened not to do so. From page 208 of the record:

> Q. And is it a matter of fact, Kimberly, that back there in the back rooms of this courthouse just before the trial of your father on September 25th that one Amelia Davis threatened you with jail if you didn't come out here and testify against your father?
>
> A. Yes, sir. And also Mr. Rebarchek from the Attorney General's office, Miss Kathy Hill and Mr. Doug Mitchell.
>
> Q. Tell us what Miss Kathy Hill told you back there just before the trial?
>
> A. That if I did not the way that they wanted me to they could have me charged with perjury. (R-208).

and on pages (R-210-211):

> Q. Okay. And what other threats or coercion, if there were any, did you receive before your father's trial in September of 1985?
>
> A. Let's see. In July I called a Sergeant Morris and a Lieutenant Evans, they are both state troopers, and told them it was not true and I had been lying, and that Mrs. Davis and Mr. Mitchell called me and told

me that they could send a sheriff's deputy or someone to come get me and take me to jail. Then Mrs. Davis told me that if I would agree to go to Gulf Coast Hospital and could prove to the people that I was telling the truth when I said it didn't happen then I could go home and they would drop the case. And we had to go to court to get that arranged,. And Judge Crow said that I had to go. And then afterwards she told me that if I wanted to get out of Gulf Coast Hospital that I had better say it happened or she could make -- she could, how would you say it, she could make sure that I would stay there.

Kimberly also testified, at page 209 of the transcript, that she had been threatened with perjury charges before her present testimony.

Q. MR. HARDEN: Have you been told by anyone that you could be charged with perjury today, please, ma'am?

A. Yes, sir.

Q. And who told you that?

A. Mr. Higgins.

Q. Who is Mr. Higgins?

A. I believe an investigator for the Attorney General's office.

Q. Is that Mr. Higgins sitting on the

front row right there from the Attorney General's office?

A. Yes, sir.

Q. Did he tell you that if you came in this courtroom today that you would be charged with perjury?

A. He told me that my testimony would be perjury because I said a different story in the first trial.

Q. Okay. Do you know what perjury is, Kimberly?

A. Not exactly, sir.

Q. Do you know you can go to jail for it though?

A. Yes, sir. (R-209).

Ms. Hooper identified a Rusty Miller as the only person with whom she had ever had sexual intercourse. She denied the Petitioner had ever abused or threatened her (R-215).

The State opened its case by calling Mr. Donald Champion. Mr. Champion identified State's Exhibits 1A, 2A and 3A as three pornographic tapes that he

had loaned Petitioner around March of 1984. However, on cross-examination, Mr. Champion admitted that he was not certain that State's Exhibits 1A, 2A and 3A were the tapes that he had loaned the Petitioner.

Next, Captain L. N. Hagan testified that, in the course of his duties for the Alabama Bureau of Investigation, he had investigated the rape complaints made by Kimberly Hooper and that the only person she named as having had sexual intercourse with was her father, the Petitioner. Captain Hagan identified State's Exhibits 1A, 2A and 3A as the three tapes, he, Doug Mitchell, Ameila Davis and Bill Rhegness had determined that Kimberly Hooper had watched based on her statements to Mrs. Davis (R-265). Captain Hagan described, over the Petitioner's objection that a

proper predicate had not been laid, the contents of the tapes (R-268-271).

The State called Stephanie Milam, Tyra Thomley, Michelle Lucas and Carol Middleton to testify that Kimberly Hooper had made complaints to them that her father had raped her. Ms. Middleton stated that she reported the abuse to the Department of Human Resources. Stephanie Milam further testified that Mr. Hooper had forced her to watch an X-rated tape with him and his daughter. From page 318 of the record:

> Q. Have you ever watched sexually explicit television programming in Kimberly's house?
>
> A. Once.
>
> Q. Was the defendant present? Was Mr. Hooper present?
>
> A. Yes.

and on page R-321:

> Q. (MRS. POE): Did you while watching sexually -- did you watch sexually explicit

programing in Kimberly's home?

A. Yes.

Q. Was Mr. Hooper present at that time?

MR. HARDEN: Object, it's repetitious.

THE COURT: I overrule.

MR. HARDEN: Except.

Q. (MRS. POE): You may answer.

A. Yes.

Q. Did you attempt to leave?

A. Yes.

Q. Did any one say anything? Did he say anything to you?

MR. HARDEN: Object to who "he" is. It's not clear.

Q. (MRS. POE): Mr. Hooper. Did Mr. Hooper say anything to you at that point?

A. Yes.

Q. What did Mr. Hooper say to you?

A. Don't go, don't leave, stay, you know.

She also contradicted Ms. Hooper concerning their friendship. From page

R-310 of the record.

Q. How did you know Kimberly?

A. We were best friends.

Q. Did you all do things together?

A. Yes, we did.

Q. Could you tell the jury what kind of things you did together?

A. We spent the night with each other. We rode the bus. We had classes together. We did practically everything together.

Rusty Miller testified and denied that he had ever had sexual intercourse with Kimberly Hooper or that he had ever even been at her house (R-363).

During the cross-examination of Stephanie Milam, the Petitioner attempted to determine whether or not Ms. Milam had ever been a victim of sexual abuse (R-326):

Q. You was molested?
MRS. POE: Objection, Your Honor.

MR. HARDEN: She opened the door on it, Judge.

THE COURT: What are your grounds?

MRS. POE: The question as whether this witness had ever been molested is irrelevant as to whether or not Kimberly Sue Hooper was ever molested.

THE JUDGE: I sustain the objection as to what the content of the dream was. I don't think that's a issue.

Later, while Michelle Lucas was being examined, the Petitioner made an offer of proof to show that both Stephanie Milam and Michelle Lucas had previously been sexually abused.

We think that the jury is entitled to know, that is to show, really, the motive. We offer it to show motive as to why the witnessin this case against this defendant John Hooper would give statements to these little girls to the effect that her father also did that to her. We would show it as compassion to console these two witnesses; Milam and Lucas.

We also offer to prove that we think we are allowed to prove it, to show bias, interest and prejudice against this man, John Hooper by these witnesses; Milam and Lucas.

I think we are entitled to have a thorough and sifting cross-examination insofar as it pertains to their being the prosecutrix in the past.

Judge Byrne denied this offer of proof because he did not feel that the evidence that would be elicited would be sufficient to show bias.

> THE COURT: I am assuming that what you are saying is correct, if she would testify to that, and even so it is my opinio that that would not be sufficient to show a bias towards this defendant.

Dr. Jimmy Adkisson testified and was offered as an expert witness. Dr. Adkisson stated that Kimberly Hooper's introitus, the opening of her vagina and her vaginal wall, was enlarged. He said this enlargement could have been from sexual intercourse. (R-418).

The State then called and offered Dr. James Chudy as an expert witness "from a psychological standpoint of child abuse." (R-440). Dr. Chudy stated that, based upon certain validators used in evaluating children for sexual abuse, he

had reached the conclusion that Kimberly Hooper had been sexually abused (R-448).

On cross-examination, Dr. Chudy admitted that his examination of Kimberly Hooper consisted of only one five hour session. He indicated that he had recommended that Kimberly return for further consultation and therapy, but that the Department of Human Resources did not make another appointment after they received his initial evaluation. Dr. Chudy identified a letter from Dr. Roy Barnes, which he had in his files, stating that in Dr. Barnes opinion, the Petitioner "was not a threat to his daughter from a sexual abuse standpoint" (R-453). Dr. Chudy also stated that one psychologist could reach a determination of sexual abuse when another psychologist, based on the same interview, would decide that there had

been no sexual abuse (R-465).

Amelia Davis was called as the State's final witness. She testified that she had worked for the Escambia County Department of Human Resources and investigated Kimberly Hooper's complaint of sexual abuse against her father. Mrs. Davis stated that she first interviewed Kimberly Hooper on January 15, 1985 and that Kimberly Hooper first recanted her story on February 19, 1985.

Mrs. Davis described the process by which she, Captain Hagan, Doug Mitchell and Bill Rhegness, based on the statements of Kimberly Hooper, identified State's Exhibits 1A, 2A and 3A as the tapes viewed by Kimberly Hooper (R-480).

On cross-examination, Mrs. Davis initially denied having problems with Kimberly Hooper telling lies but was

impeached with a prior statement she had given in Juvenile Court:

> Q. Do you remember this answer by you, please ma'am: "It is not lying about her story but it is lying to her mother about me and lying to me about her mother. It is that kind of thing. Not so much about the sexual abuse but about the things that she tells her mother about me and she tells me about her mother. They are just not the same thing." Do you recall making that statement under your oath?
>
> A. I could have made that. (R-493-494).

Also, Mrs. Davis testified that she had investigated a prior complaint of sexual abuse, containing similar allegations to those made by Kimberly Hooper against her father, by Ms. Hooper against a Mr. A. R. Gunn which turned out to be false (R-498). During cross-examination Mrs. Davis insisted that she always told Kimberly to tell only the truth but she admitted that, Kimberly knew it was her opinion that Kimberly's

initial accusations against the Petitioner were truth (R-516-517).

Further, Mrs. Davis described numerous emotional problems including nightmares, eating disorders and lying, that Kimberly had experienced since she had been removed from her parent's home (R-522-523). However she testified that Kimberly, at age 13, would be more susceptible to influence that at age 17.

After Mrs. Davis testified, the State recalled Michelle Lucas, Stephanie Milam and Tyra Thomley to complete the predicate for their earlier testimony concerning Kimberly's rape complaints. The Petitioner objected to this procedure due to the effect of these witnesses testifying twice on the jury and because it was shown that after their original testimony they had entered the courtroom and stayed for an

undetermined length of time. Ultimately, Stephanie Milam had to be recalled a second time for this same purpose.

After the State rested, the Petitioner moved for a Judgment of Acquittal based on the failure of the State to prove a prima facie case of second degree rape or to properly prove venue (R-573-579). The trial court denied this motion (R-582).

The Petitioner called 22 witnesses to testify as to his good character and his excellent reputation in the community for truth and veracity. One of these character witnesses, Adam Bailey, testified that sometime in 1984 he had been with Rusty Miller at Kimberly Hooper's house when her parents were not there (R-592). Jimmy Dukes, another character witness, stated that he had

overheard an argument in the Hooper household concerning Kimberly being alone with boys at their home while her parents were away (R-730).

Virginia Hooper, Petitioner's wife, was called and testified as to the pressure placed upon her by Amelia Davis and Doug Mitchell of the Department of Human Resources to believe the accusations against the Petitioner. This included cancelling and delaying her visitation with Kimberly and at R-613:

> A. Uh, every time we visited instead of just talking about the weather or Kimberly's school, she made Kimberly tell me in detail how my husband was suppose to have molested my daughter, or our daughter.

and on page R-617,

> Q. (MR. HARDEN): We were talking about a nasty remark that you considered made by Mr. Rebarchek.
>
> A. Yes, sir.
>
> He accused Kimberly's whole family

of deserting her and that I wasn't a very fit mother to have not stood by my daughter and to have chosen my husband instead.

Q. What exactly did they want you to do; do you know?

A. Yes, sir. I was supposed to go over to their side and help them convict my husband, even though they had been told on numerous occasions by my daughter that he had not done anything.

Q. Mrs. Hooper when you were having these visitations, I think you described were some four or five in number, prior to the trial was there ever any discussion by Kimberly in the presence of Amelia Davis about the fact she was trying to recant her story?

A. Yes, sir.

Q. And do you recall maybe what she said or what Amelia Davis said?

A. Kimberly testified that it was, I mean, I'm sorry, she just said that it was a big mistake and that it hadn't happened. And then Amelia Davis said, "No, you're just saying that because that's what your mother wants you to say. (R-617)

Mrs. Hooper further testified that Kimberly had experienced emotional

problems as early as age three (R-618-619) and that to help control her emotional problems Kimberly was prescribed the drug Ritalin (R-622). Mrs. Hooper stated that she had received reports of Kimberly fantasizing after she had been removed from her custody by the Department of Human Resources.

John Hooper, Jr., Kimberly's brother, testified that he had seen Rusty Miller at his home in Atmore with Kimberly on occasion when his parents were absent. Also, he denied that his father had ever locked him out of the family home although Kimberly had done so occasionally (R-647-646).

The Petitioner, John Edward Hooper, denied that he had ever sexually abused his daughter (R-658). He further denied that he had made Stephanie Milam watch an X-rated film (R-658); that he had

ever admitted raping his daughter while talking with her on the phone (R-659); or that he had showed his daughter X-rated films prior to having sexual intercourse with her (R-663).

During cross-examination the Petitioner stated that while he had taken certain X-rated tapes to his home he did not realize that they were pornographic until he had watched part of one of them. At that point he stopped watching it and returned all of them as soon as possible.

The Petitioner, during cross-examination, continued to deny that he had ever sexually molested his daughter in any way (R-686).

The Petitioner rested and renewed his Motion for Judgment of Acquittal. The trial court again denied this motion. During the Court's charge, Judge Byrne

charged the jury as follows on page R-751:

> Now, the prior testimony of Kimberly Sue Hooper given in September of 1985 while she was under oath and subject to cross examination can be used by you as substantive evidence of the facts stated by her during her prior testimony to prove or disprove the innocence or guilt of the Defendant John Edward Hooper of the offenses alleged in the indictment. Only the prior testimony of Kimberly Sue Hooper can be considered by you as substantive evidence. (Emphasis added).
>
> Now, the prior testimony, as I have already mentioned, of all the other witnesses or of all the witnesses can be used for impeachment purposes, that is, a witness's prior testimony can be used to show that prior to this trial the witness made statements that are inconsistent with the testimony given in this trial and such prior inconsistent statements can be used by you to judge the credibility of that witness.

The Appellant requested that the Court recharge the jury at pages R-758-759 but the Court refused. The Appellant then moved for a mistrial which was denied by the Court.

After he completed his charge, the trial court finally ruled that due to the inflammatory nature of their contents State's Exhibits 1A, 2A and 3A would not be admitted or taken by the jury to the jury room during deliberation (R-760). The jury began deliberating at 4:50 on September 16 and returned a verdict of guilty to both charges at 6:30.

REASONS FOR GRANTING THE WRIT

"The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." Davis v. Alaska, 415 US 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Although this right is limited by "other legitimate interest in the criminal trial process ...its denial or significant diminunition calls into question the ultimate "integrity of the fact finding process" and requires that the competing interest be closely examined." Chambers v. Mississippi, 410 US 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). As a result "a criminal defendant states a violation of the confrontation clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." Delaware v. Van Arsdall, 475 US 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

ARGUMENT

I.

> Have you been or has any member of your famly ever been the victim of rape or any sexual abuse?

This question was posed by the trial court to a jury venire of some forty (40) citizens of Escambia County, Alabama on page R-58 of the Clerk's Record . Two of the potential jurors answered this question in the affirmative and were dismissed by the Court for cause because he did not feel they could give the Petititioner a fair and impartial trial.

Later in the week, the Petitioner made an offer of proof to show that Stephanie Milam and Michelle Lucas, two of the State's corroborating witnesses to the

rape complaint made by Kimberly Hooper, were biased against the Petitioner, who was accused of sexually abusing his daughter, as a result of their own experiences of being sexually abused. The basis of this offer of proof is stated on pages R-346-347 of the record as follows:

> THE COURT: Let me make sure I understand your objection or your offer of proof or whatever.
>
> You want to show the bias of these witnesses toward the defendant based upon their prior accuasations or occurrences of abuse; is that right?
>
> MR. OWENS: That's, I think, in substance.
>
> MR. HARDEN: Also, Judge, there's some conflict in the testimony of Stephanie Milam or Miland, whichever the case might be, there's some conflict in her testimony and in the testimony of Kimberly Hooper. Somebody has told a story. And we offer it, further, to show motive on the part of this little Milam to give false testimony. The jury has got to decide who is giving false testimony.
>
> The Court did not deny the

Petitioner's offer of proof but stated as follows on pages R-349-350 of the record:

> THE COURT: Okay. I don't feel that the testimony that you all would elicit from these witnesses about these other occurrences would show bias toward this defendant.
>
> I think, reviewing the cases in McElroy, there's got to be more of a direct link to show bias toward this defendant, like something that occurrred between them. I don't think the motive gets it either. So, for that reason, I guess, I'm denying your motion or ...

and on pages R-351-353:

> THE COURT: --but I'm just saying if they did testify as you stated that I would still not allow their testimony to come in to show bias against this defendant.
>
> I want to make it clear I'm not saying you can't call them in here and put them on the stand and ask them, elicit from them the answers that you say they would give. Nobody has contested that, really.
>
> THE COURT: I am assuming that what you are saying is correct, if she would testify to that, and even so it's my opinion that that would not be sufficient to show a bias toward this defendant.

That the right to cross-examination of adverse witnesses is a fundamental constitutional right is beyond question. The Supreme Court of the United States in Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974(stated that "the Sixth Amendement to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him" and that this right extended to both State and Federal proceedings. Davis,supra, 415 U.S. at 315, 39 L.Ed.2d at 353. See Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The Court in Davis,supra discussed the meaning of the defendant's right to confront his accusers:

> "Confrontation means more than being allowed to confront the witness physically. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is

the right of cross-examination." Douglas v. Alabama, 380 U.S. 415-418, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

Professor Wigmore stated:

"The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witnesses, or being gazed upon by him, but for the purpose of cross-examination, which cannot be had, except by the direct and personal putting of questions and obtaining immediate answers." (Emphasis in original) 5 J.Wigmore, Evidence Section 1395, p. 123 (3rd Ed. 1940).

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested subject always to the broad discretion of a trial judge to preclude repetitive and unduly harrasing interrogation, the cross-examiner is not only permitted to delve into the witness's story to test the witness' preception and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. Davis, supra, 415 U.S. at 315,316.

The Petitioner contends that the issues that he attempted to bring to the

attention of the jury were very relevant and critical to his defense in this matter: the bias of the witnesses Stephanie Milam and Michelle Lucas and the motivation of Kimberly Hooper in revealing to Miss Milam and Miss Lucas that she had been the victim of sexual abuse. During cross-examination by the State, Kimberly Hooper testified as follows from page R-201 of the record:

> Q. Did you ever at any time prior to September 16, 1985, when you testified right here, did you ever watch those films with Stephanie Milam and your father at your house in Atmore, Alabama?
>
> A. No, sir.
>
> Q. At any time ever?
>
> A. Stephanie has never been in my house.

and on page R-202:

> Q. --did you ever have an occasion to watch on the satellite dish with Stephanie Milam and your father X-rated, pornographic TV shows?

A. No, sir.

Thereafter, Stephanie Milam was questioned and testified as follows from page R-310 of the record:

Q. How did you know Kimberly?

A. We were best friends.

Q. Did you all do things together?

A. Yes, we did.

Q. Could you tell the jury what kind of things you did together?

A. We spent the night with each other. We rode the bus. We had classes together. We did practically everything together.

Miss Milam again contradicted the testimony of Kimberly Hooper on page R-318 of the record as follows:

Q. Have you ever watched sexually explicit television programming in Kimberly's house?

A. Once.

Q. Was the defendant present? Was Mr. Hooper present?

A. Yes.

and on page R-321:

Q. (MRS. POE): Did you while watching sexually--Did you watch sexually explicit programming in Kimberly's home?

A. Yes.

Q. Was Mr. Hooper present at that time?

A. Yes.

Q. Did you attempt to leave?

A. Yes.

Q. Did any one say anything? Did he say anything to you?

MR. HARDEN: Object to who "he" is. It's not clear.

Q. (MRS. POE): Mr. Hooper. Did Mr. Hooper say anything to you at that point?

A. Yes.

Q. What did Mr. Hooper say to you?

A. Don't go, don't leave, stay, you know.

Because Kimberly Hooper, the prosecuting witness, was attempting to recant her story about her father, the Petitioner, molesting her, the most

important issue involved in this case for the jury to decide was the credibility of Kimberly Hooper. Miss Milam was called by the State to verify that Miss Hooper had made rape allegations. This she did. Testimony about Kimberly Hooper making the rape allegations would not have been damaging since Miss Hooper admitted that she had made the allegations, only that they were false. However, Miss Milam went further and contradicted Miss Hooper's testimony in the above manner. Petitioner contends that this created a situation where the credibility of both Miss Hooper and Miss Milam was an issue so that he should have been able to show the potential bias of Miss Milam.

In Davis, supra, the defendant sought to show the existence of potential bias and prejudice of a prosecution witness

causing him to falsely identify the defendant. The witness, Green, had a juvenile record and was on probation in juvenile court. The defendant sought to show this through cross-examination on the theory that the witness was more susceptible to influence by the State, but was prevented from doing so by a protective order. The Supreme Court further analyzed the confrontation clause,

> "a more particular attack on the witness' credibility is affected by means of cross-examination directed toward reversing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony.'" 3A J. Wigmore Evidence, Section 940, p. 775 (Chadbourne revised 1970) Davis, supra 415 U.S. at 316.

The Supreme Court reversed Davis' conviction concluding that the jury was

> "entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act.'" Davis, supra 415 U.S. at 317.

The Court stated that the State's interest in preserving the anonymity of a juvenile offender was overridden by the right of confrontation.

In Olden v. Kentucky ____ U.S. ____, 109 S.Ct. 480, ____ L.Ed.2d ____ (1988) the defendant had been restricted from cross-examining a key prosecution witness about her interracial relationshiop because of the danger such would prejudice the jury against her. The Supreme Court in Olden, supra stated that:

> "a criminal defendant states a violation of the confrontation clause by showing that he was

> prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness'". Olden, supra 109 S.Ct. at 483 (quoting Davis, supra 415 U.S. at 318, 94 S.Ct. at 1111).

In reversing Olden's conviction, the Supreme Court held that:

> "while a trial court may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take account of such factors as "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant" . . . speculation as to the effect of "jurors racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of Matthews' testimony." Olden, supra 109 S.Ct. at 483.

The Court thereafter mad a determination as to whether the error was harmless in accordance with the standard enunciated in Chapman v.California, 386 U.S. 18, 18

S.Ct. 824, 17 L.Ed.2d 705 (1967) and applied to confrontation clause errors by the Supreme Court in Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

In Delaware v. Van Arsdall, supra the trial court prevented the accused from cross-examining a witness concerning the State's dismissal of his pending public drunkeness charge as a basis for determining his bias toward the State. The State acknowledged that the charge had been dismissed but the trial court, nevertheless, prohibited all inquiry into the possibility that the witness would be biased as a result. The Supreme Court reversed stating:

> "[b]y thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the Court's ruling violated

respondent's right secured by the confrontation clause." Van Arsdall, supra 106 S.Ct. at 1435.

However, the Court also held that the denial of a defendant's right to impeach a witness for bias is subject to harmless-error analysis by determining whether "the error was harmless beyond a reasonable doubt." Van Arsdall, supra 475 U.S. at 684.

The Alabama Court of Criminal Appeals in discussing the limits of cross-examination, in Page v. State, 487 So.2d 999 (Ala.Crim.App. 1986), stated "it is always permissible to cross-examine a witness to ascertain his interest, bias, prejudice, or partiality concerning matters about which he is testifying. Generally, anything which tends to show bias, unfriendliness, enmity, or inclines the witness to swear against the party is admissible". Page, at

1003. Although the trial court has discretion in this area, the Court of Criminal Appeals in Proctor v. State, 331 So.2d 828 (Ala.Crim.App.) 1976) indicated that "where the witness' testimony is of major importance and is strongly adverse to the party against whom he has testified, the usual discretion of a trial court has a narrow range, and it generally is required to allow proof of any important fact indicating bias of the witness". Proctor, at 830.

The Court of Criminal Appeals in Moody v. State, 495 So.2d 104 (Ala.Crim.App. 1986), further defined the discretion of the trial judge to limit the cross-examination of a witness as to bias. The Court quoted the United States Supreme Court that the trial court's "discretion must be exercised with due

regard for the defendant's constitutional rights. Specifically, it is an abuse of discretion and a violation of constitutional rights to deny to a defendant the right to cross-examine a witness at all on a "subject matter relevant to the witness' credibility", such as the witness' possible motive for testifying falsely". Moody, supra, at 106. (Quoting Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

The Court, in Moody, supra reversed the defendant's conviction because the trial court had denied defense counsel the opportunity to cross-examine a prosecution witness to determine if the fact that she was under indictment would prejudice her against the defendant. The Court found that "certainly the fear of prosecution . . . by the State might

cause her to testify favorably on behalf of the State." Moody, at 106.

In Baker v. State, 568 So.2d 374 (Ala.Crim.App. 1990) a key State's witness was under investigation for possession of drugs. The defense attorney attempted to cross-examine him concerning any possible bias because of the fears he had about being prosecuted, but was prevented by the trial court. The Court of Criminal Appeals reversed holding the witness' belief went to his state of mind and that "the defense attorneys should have been permitted to disclose his fears and any possible bias." Baker, supra, at 377 (Emphasis Ours).

In the current case, the Alabama Court of Criminal Appeals, in its decision of March 29, 1991, agreed that the trial court had improperly restricted

Petitioner's cross-examination of the witness, Stephanie Milam, holding that the trial court erred "at least with regard to S. M. in not allowing defense counsel to cross-examine (her) about whether she had been sexually abused." However, the Court of Criminal Appeals, relying on Van Arsdall, ruled that the error was harmless "because the fact that the prosecutrix made complaints to her two friends was corroborated by other witnesses, and because other witnesses testified to the fact that the prosecutrix had made complaints to them".

In reaching this decision, the Court of Criminal Appeals cited the following factors enunciated by the United States Supreme Court in Van Arsdall, supra to be used by reviewing courts in determining whether a trial court's

restriction of cross-examination was harmless error:

1. The importance of the witness' testimony;

2. Whether the testimony was cumulative;

3. The presence or absence of evidence corroborating or contradicting the testimony;

4. The extent of the cross-examination otherwise permitted; and

5. The overall strength of the prosecution's case.

In Van Arsdall, supra the Supreme Court remanded the case for the Delaware Supreme Court to determine, based on the above factors, whether the error was harmless beyond a reasonable doubt. However, in Olden, supra the Supreme Court applied these factors to the facts before it and found:

1. That the excluded testimony was crucial to the State's case.
2. That the excluded testimony was directly contradicted by the Petitioner as in this case and another witness.

3. That the excluded testimony was corroborated only by that of another witness which was likewise questionable.
4. That the State's case was "far from overwhelming".

Therefore the Court found it "impossible to conclude 'beyond a reasonable doubt' that the restriction on Petitioner's right to confrontation was harmless". Olden, supra 109 S.Ct.484.

In the present case, while the Petitioner would be reluctant to concede that the ability to cross-examine a prosecution witness and thereby weaken the State's case against a criminal defendant would not be of any value, it is obvious that the Court of Criminal Appeals did not fully examine all of the facts in making its decision. Although, Stephanie Milam may have been just one of several witnesses to corroborate

Kimberly Hooper's rape complaints, she also gave further testimony concerning her friendship with Ms. Hooper and of the incident at the Hooper house where she alleged that the Petitioner forced her and Kimberly to watch a sexually explicit movie.

The Petitioner would argue that the application of the factors suggested by the United States Supreme Court in Van Arsdall, supra and Olden, supra to these additional allegations by Stephanie Milam, creates more than a reasonable doubt that the trial court's error contributed to the jury's verdict.

1. The allegation by Ms. Milam that the Petitioner forced her to watch a sexually explicit movie was the only direct testimony from any witness, other than Kimberly Hooper, that the Petitioner was guilty of some

wrongdoing.

2. The testimony by Ms. Milam was totally uncorroborated.

3. Ms. Milam had testified at the prior trial of the Petitioner and failed to mention the incident involving the sexually explicit movie.

4. Both the Petitioner and Kimberly Hooper contradicted Ms. Milam's testimony concerning the sexually explicit movie.

5. The Petitioner's cross-examination of Ms. Milam concerning the incident that was permitted by the trial court created a jury question as to her credibility which made the trial court's restriction of Petitioner's attempts to show Ms. Milam's bias all the more critical.

6. Finally, the State's case against the Petitioner consisted primarily of

the impeached prior testimony of numerous witnesses who stated that Kimberly Hooper had made rape complaints to them, the opinion of Dr. Jimmy Adkisson that Kimberly Hooper had been sexually active and the opinion of Dr. James Chudy, a psychologist, that Ms.Hooper had some of the characteristics of a child who had been sexually abused. Once again, the only direct testimony linking the Petitioner with any wrongdoing was that of Kimberly Hooper, who was recanting her allegations, and of the witness, Stephanie Milam, concerning the incident involving the X-rated movie at the Hooper house.

Therefore, the Petitioner contends that the trial court's abuse of discretion in limiting the Petitioner's cross-examination of State's witnesses,

Stephanie Milam and Michelle Lucas, after admitting that the Petitioner would be able to show a history of sexual abuse before it could be determined if the traumatizing effects of sexual abuse had caused them to feel some bias toward the Petitioner who was accused of rape, denied him his rights under the confrontation clause contained in the Sixth Amendment and applied to the states by the Fourteenth Amendment.

Further, based on the foregoing, the Petitioner argues that it would be impossible for this Court, as it was for the Court in Olden, supra "to conclude 'beyond a reasonable doubt' that the restriction on Petitioner's right to confrontation was harmless". Olden, supra 109 S.Ct. at 484.

Petitioner has previously asked this Court to review his conviction and the

ruling by the Alabama Supreme Court reversing the Alabama Court of Criminal Appeals on the issue of the use of Kimberly Hooper's prior testimony as substantive evidence when the established law at the time of Petitioner's trial was that such testimony could not be substantive evidence. Previously, the Petitioner asked this Court to disregard the fact that he was charged with the rape of his daughter and look merely at the Constitutional questions involved. The Petitioner wishes to caution the Court once again.

The Petitioner agrees with this Court that "child abuse is a problem of disturbing proportions in today's society," and that the lack of witnesses other than the victim creates the biggest obstacle to the detection of

child abuse. See Coy v. Iowa ____U.S.____, 108 S.Ct. 2798, 2803, 101 L.Ed.2d 857 (1988), Pennsylvania v. Ritchie, 480 U.S. 39, 60, 107 S.Ct. 989, 1003, 94 L.Ed.2d 40 (1987).

Petitioner further realizes that a ruling by this Court in his favor could adversely affect the willingness of victims of child abuse to come forward when they are witnesses in other cases and risk extensive and humiliating cross-examination by the defendant.

The Petitioner is asking this Court to look at the issues as it did in both Coy, supra where it held that the placement of a screen between the defendant and child sexual abuse victims violated the defendant's rights under the confrontation clause and Ritchie, supra where it permitted the review of a Department of Children and Youth

Services file in the defendant's trial for the rape of a minor, when it weighed measures for the protection of minor victims of abuse against the rights of defendants under the confrontation clause and ruled that the Constitutional concerns prevailed. The Petitioner is merely asking that this Court see that his Constitutional rights should prevail in this case and that this Court should grant this petition of Writ of Certiorari and reverse his conviction in the Circuit Court of Escambia County.

CONCLUSION

The petition for Writ of Certiorari should be granted and the Petitioner's

conviction in the Circuit Court of Escambia County, Alabama, should be reversed and remanded for a new trial where his Constitutional rights under the confrontation clause will be protected.

The Petitioner is respectfully requesting that this Court recognize that his rights of confrontation as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were denied him by the trial court when it restricted his cross-examination of the State's witnesses, Michelle Lucas and Stephanie Milam.

DATED at Evergreen, Alabama, this the ____ day of November, 1991.

Respectfully submitted,

Paul M. Harden
ATTORNEY FOR PETITIONER
417 Rural Street
Evergreen, Alabama 36401
205/578-4746

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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN EDWARD HOOPER,

Petitioner,

versus

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT
AND
ALABAMA COURT OF CRIMINAL APPEALS

APPENDIX TO PETITION FOR WRIT
OF CERTIORARI

Paul M. Harden
ATTORNEY FOR PETITIONER
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THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1989-90

(Released March 30, 1990)

3 Div. 91

John Edward Hooper

v

State

Appeal from Escambia Circuit Court
CC-85-62

BOWEN, JUDGE

John Edward Hooper was convicted of two counts of second degree rape and was sentenced to five years' imprisonment on each conviction. Although Hooper raises nine issues in this appeal from his convictions, we need address only two.

Hooper was originally tried and convicted of these crimes in September 1985. His convictions were subsequently reversed

because the prosecutor had asked improper questions of character witnesses on cross-examination. Hooper v. State, 523 So.2d 469 (Ala.Crim.App. 1986). Hooper was retried and was again convicted in September 1988. Prior to his second trial, the prosecutrix, Hooper's daughter, recanted her allegations.[1] She also refused to testify against Hooper at the retrial. It is undisputed that before the second trial the State was aware that she had recanted her stories and would not testify against him.

The prosecutrix was the first witness to testify at the retrial. At the request of the State and over Hooper's objection, she was called as the court's witness and, in response to specific questions posed by the court,

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[1] The prosecutrix had intially made a complaint against Hooper in January 1985, at which time she was 13 years old. It appears from the record that, beginning the month after making her complaint, she has periodically recanted her story.

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COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
JUDICIAL BUILDING
MONTGOMERY, ALABAMA

3 DIV 91

John Edward Hooper

v.

State of Alabama

You are hereby notified that on May 17, 1991, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing overruled. Rule 39(k) motion denied. No opinion.

Lane W. Mann, Clerk
Alabama Court of
Criminal Appeals

lg

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

August 23, 1991

1901381

Ex parte John Hooper

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: John Edward Hooper v. State)

(CCA 3/91 (Escambia CC-85-62)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COSTS TAXED TO PETITIONER.

Steagall, J.-Hornsby, CJ., Shores, Adams and Ingram, JJ., concur.

Hooper contends, and we agree, that the trial court erred in giving the following instruction to the jury:

> "Now, the prior testimony of [the prosecutrix] given in September of 1985 while she was under oath and subject to cross-examination can be used by you as substantive evidence of the facts stated by her during her prior testimony to prove or disprove the innocence or guilt of the Defendant John Edward Hooper of the offenses alleged in the indictment."

This instruction was given at the State's request and in reliance on dicta contained in this court's opinion in Randolph v. State, 348 So.2d 858 (Ala.Crim.App.), cert. denied, 348 So.2d 867 (Ala. 1977).

Contrary to the dicta contained in Randolph, 348 So.2d at 866, the Alabama Supreme Court clearly stated in Lester v. Jacobs, 212 Ala. 614, 618, 103 So. 682, 686 (1925): "The general rule in this jurisdiction is that the testimony given on a former trial by a witness at the last trial in only

admissible, after a proper predicate, for the purpose of contradiction or impeachment; it is not competent as cumulative or original evidence." (Emphasis added.) Accord, Manning v. State, 217 Ala. 357, 359, 116 So. 360, 361 (1928) (testimony given at a preliminary hearing could have been introduced, "not as original evidence of fact, but for the purpose of testing the recollection of the witness, or for impeachment") (emphasis added); Porter v. Louisville & Nashville R.R., 202 Ala. 139, 142, 79 So. 605, 608 (1919) ("In no event could [the prior testimony] have been received as original evidence ..., nor do we assume that it was offered for that purpose") (emphasis added). Cf. Corona Coal & Iron Co. v. Callahan, 202 Ala. 649, 650, 81 So. 591, 592 (1919) (in suit for malicious prosecution, it was reversible error to admit testimony from the underlying trial as original evidence); E. E. Yarbrough Turpentine Co. v.

Taylor, 201 Ala. 434, 435, 78 So. 812, 813 (1918) (same); Thompson v. Richardson, 96 Ala. 488, 492, 11 So. 728, 729 (1892) (same). In the event a witness's inconsistent testimony from a prior trial is admitted, the jury should be clearly instructed that this testimony may be considered for impeachment purposes only and not as independent or original evidence. See Manning v. State, 217 Ala. at 359, 116 So. at 362; Kennedy v. State, 85 Ala. 326, 331, 5 So. 300, 301 (1888).

The rationale advanced by the Alabama courts for holding prior inconsistent statements, even those given as testimony in a prior proceeding, inadmissible as substantive evidence is that such statements are "purely hearsay." Corona Coal & Iron Co. v. Callahan, 202 Ala. at 650, 81So. at 592. Accord, Thompson v. Richardson, 96 Ala. at 492, 11 So. at 729 ("merest hearsay"). The Federal Rules of Evidence offer a different

view with regard to prior inconsistent statements "given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition." Fed.R.Evid. 801(d)(1)(A). Rule 801(d)(1)(A) provides that such a statement is not hearsay where made by a witness who testifies at the present trial and who is subject to cross-examination concerning the prior statement. Several states have adopted this federal rule or a version thereof. See generally 4 D. Louisell & C. Mueller, Federal Evidence §410 (1980 & Supp. 1989) (State Adoptions of Rule 801).

In Randolph v. State, 348 So.2d at 863-64, this court reversed the defendant's conviction because the trial court had failed to specifically instruct the jury that the prior inconsistent testimony of the State's primary witness, which had been offered for impeachment purposes, could not be considered

as substantive evidence. Through an opinion authored by the late Leigh M. Clark, Supernumerary Circuit Judge, we then went on to question the soundness of this aspect of Alabama law. We noted that there is "widespread dissatisfaction with the traditional rule," which is followed in Alabama, and that many judges and scholars "have pressed for repudiation of the rule that prior inconsistent statements of a non-party witness have no substantive consequence in a present trial." Gamble, Howard, & McElroy, The Turncoat of Chameleonic Witness: Use of His Prior Inconsistent Statement, 34 Ala.L.Rev. 1, 18 (1983) (footnotes omitted) (citing Randolph, 348 So.2d at 864). We also discussed Federal Rule 801(d)(1)(A) and the history of its adoption. Randolph, 348 So.2d at 865-66. Recognizing the incongruity in permitting a witness's prior testimony to be admitted as substantive evidence when the witness is

Alabama Supreme Court cases cited at the outset of this discussion have not been overruled or otherwise modified by that court.[4] This court is bound by the decisions of the Alabama Supreme Court, §12-3-16, Ala. Code (1975), and may not "overturn or change [those decisions] in any manner." Passmore v. State, 47 Ala.App. 189, 191, 252 So.2d 115, 116 (1971) (emphasis added). In light of those cases, we have no alternative to the conclusion that the trial court erred in instructing the jury that the prior inconsistent statement of the prosecutrix could be considered substantive evidence.

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[4] The Supreme Court denied the petition for writ of certiorari filed by the State in Randolph, without opinion or comment. Ex parte State ex rel. Attorney General, 348 So.2d 867 (Ala. 1977). The denial of a petition for writ of certiorari "does not necessarily indicate [the Supreme Court's] approval of all the language used or all of the legal conclusions contained in the opinion sought to be reviewed." Morrison v. Morrison, 287 Ala. 343, 251 So.2d 764, 765

II

Hooper asserts that the evidence was insufficient to sustain his convictions. In light of our discussion in Part I, above, we are constrained to agree.

In order to convict Hooper of second degree rape, the State had to prove that Hooper engaged in sexual intercourse with the prosecutrix while she was between the ages of 12 and 16. See §13A-6-62, Ala. Code (1975). As previously noted, the only evidence incriminating Hooper was the prosecutrix's prior inconsistent testimony and her prior inconsistent statements made to a school counselor, a social worker and three of her

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Accord, Ex parte Glasco, 513 So.2d 61 (Ala. 1987); Ex parte McDaniel, 418 So.2d 934, 935 (Ala. 1982). A "denial of certiorari should never be considered as an expression by the reviewing court on the merits of the controversy." Ex parte Buse, 549 So.2d 1344 (Ala. 1989). We certainly cannot construe the denial of the writ in Randolph as an implicit overruling of the Supreme Court cases cited earlier.

friends.[5] In fact, the only actual evidence that a crime had been committed was the prior inconsistent testimony and statements. The substantive evidence contained in this record is the prosecutrix's testimony that Hooper did not not commit the acts charged in the indictment. Under these facts, we must conclude that the evidence was insufficient to sustain the convictions.

Where an appellate court concludes that the evidence is insufficient to sustain a jury verdict, the Double Jeopardy Clause of the Fifth Amendment prohibits a retrial of the defendant on the same charge. Burks v. United

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[5] The extrajudicial statements to the counselor, social worker, and friends clearly were admissible only for impeachment purposes and not as substantive evidence. E.g., Ex parte Brown, 499 So.2d 787, 791 (Ala. 1986); Cloud v. Moon, 290 Ala. 33, 37, 273 So.2d 196, 199 (1973); Isbell v. State, 57 Ala.App. 444, 450, 329 So.2d 133, 138, cert. denied, 295 Ala. 407, 329 So.2d 140 (1976). The State does not contend otherwise.

States, 437 U.S. 1, 11, 98 S.Ct. 2141, 2147, 57 L.Ed.2d 1 (1978). We are aware that the United States Supreme Court has also held that "the Double Jeopardy Clause allows a retrial where the reviewing court determines that a defendant's conviction must be reversed because evidence was erroneously admitted against the defendant, even where the court also concludes that without the inadmissible evidence there was insufficient evidence to support a conviction. Lockhart v. Nelson, 488 U.S. _____, _____, 109 S.Ct. 285, 290, 102 L.Ed.2d 265 (1988)." Fortier v. State, [Ms. 6 Div. 776, Feb. 23, 1990] _____ So.2d _____, _____ (1990). However, we find Lockhart distinguishable from the case at bar.

In Lockhart, there was other evidence, aside from the inadmissible evidence, against the defendant. The defendant, Nelson, was given an enhanced sentence under an Arkansas statute which required the prosecutor to prove

beyond a reasonable doubt four prior felony convictions. The prosecutor introduced evidence of four prior convictions; however, one of these convic-tions had been pardoned by the governor, and was therefore null and void. Although Nelson stated at the sentencing hearing that he though the conviction had been pardoned, there was no actual objection to the introduction of the conviction. 488 U.S. at _____, 109 S.Ct. at 288. Therefore, the Court was able to conclude:

> "Permitting retrial in this instance is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed; rather, it serves the interest of the defendant by affording him an opportunity to 'obtai[n] a fair readjudication of his guilt free from error.' Had the defendant offered that the conviction had become a nullity by reason of the pardon, the trial judge would presumably have allowed the prosecutor an opportunity to offer evidence of another prior conviction to support the habitual offender charge. Our holding today thus merely recreates the situation that would have been obtained if the trial court had excluded the

> evidence of the conviction because of the showing of a pardon." 488 U.S. at _____, 109 S.Ct. at 291 (citations omitted) (emphasis added).

In the case at bar, the only indication that Hooper had committed the crime with which he was charged (in fact, the only indication that a crime had been committed at all) was the prior inconsistent testimony of the prosecutrix. While this evidence was admissible for impeachment purposes, it was not admissible as substan-tive evidence and on this ground Hooper objected numerous times to its admission. Had the trial court properly excluded this evidence from consideration as substantive evidence, the State, in this particular rape trial, simply had no case. The substantive evidence contained in the record is the prosecutrix's testimony that there were no acts of sexual intercourse between her and Hooper.

Remanding a case for retrial under Lockhart "recognizes that the State may have additional evidence that it did not produce in reliance upon the strength of the errone-ously admitted evidence.... However, where it appears from the record that the State produced all available significant evidence at trial and the State does not suggest it has more, an appellate court should remand for the entry of a judgment of acquittal." State v. Baker, 228 N.J.Super. 135, 549 A.2d 62, 66 (1988). Cf. Isbell v. State, 57 Ala.App. 444, 450-51, 329 So.2d 133, 138, cert. denied, 295 Ala. 407, 329 So.2d 140 (1976) (where the only evidence incriminating to the defendant was the prior inconsistent statement of a prosecution witness, "a limiting instruction would not be appropriate, since the insufficiency of the evidence would not justify the case being submitted to the jury, unless it be submitted on the affirmative

charge requested by the defendant").

For the reasons stated above, the judgment of the Escambia Circuit Court is reversed and the cause remanded for the entry of a judgment of acquittal.

REVERSED AND REMANDED.

All Judges concur.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1990-91

(Released December 14, 1990)

89-1314

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: John Edward Hooper

v.

State)

Escambia Circuit Court
(CC-85-62)

MADDOX, JUSTICE.

The State asks us to overturn prior cases holding that testimony given under oath at a prior trial and subject to the penalty of perjury is admissible for the purpose of contradiction or impeachment but not as substantive evidence.

The Court of Criminal Appeals, noting that it was "bound by the decisions of [this Court]," held that it had "no alternative to the conclusion that the trial court erred in instructing the jury that the prior inconsistent statement of the prosecutrix could be considered substantive evidence."[1] We reverse and remand.

John Edward Hooper was initially convicted of two counts of second degree rape of his daughter. On his appeal of those convictions, the Court of Criminal Appeals reversed the convictions because the prosecutor

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[1] The issue was deliberately presented by the State, when, at the trial, the State, relying on dicta in Randolph v. State, 348 So.2d 858 (Ala.Cr.App.), cert. denied, 348 So.2d 867 (Ala. 1977), requested that the trial court instruct the jury that the testimony of the prosecutrix given in a prior trial, under oath and subject to cross-examination, could be used as substantive evidence of the facts stated in the testimony. See Hooper v. State, [Ms. 3 Div. 91, March 30, 1990] ____ So.2d ____ (Ala.Cr.App. 1990).

had asked improper questions of character witnesses.

The case was retried, and at the retrial, Hooper's daughter, the prosecutrix, recanted her story. The State questioned the daughter about her previous testimony and, thus, introduced into evidence all of her prior testimony concerning the alleged sexual abuse. The trial court, at the request of the State, specifically instructed the jury that it could consider that prior inconsis-tent testimony as substantive evidence upon which it could base a conviction.[2] The jury found Hooper guilty on

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[2] The trial judge gave the following instruction:

> "Now, the prior testimony of [the prosecutrix] given in September of 1985 while she was under oath and subject to cross-examination can be used by you as substantive evidence of the facts stated by her during her prior testimony to prove or disprove the innocence or guilt of the Defendant John Edward Hooper of the offenses alleged in the indictment."

both counts.

The Court of Criminal Appeals reversed Hooper's convictions, stating:

> "Contrary to the dicta contained in Randolph [v. State], 348 So.2d [858] at 866 [Ala.Cr.App. 1977], the Alabama Supreme Court clearly stated in Lester v. Jacobs, 212 Ala. 614, 618, 103 So. 682, 686 (1925): 'The general rule in this jurisdiction is that the testimony given on a former trial by a witness at the last trial is only admissible, after a proper predicate, for the purpose of contradiction or impeachment; it is not competent as cumulative or original evidence.' (Emphasis added). Accord, Manning v. State, 217 Ala. 357, 359, 116 So. 360, 361 (1928) (testimony given at a preliminary hearing could have been introduced, 'not as original evidence of fact, but for the purpose of testing the recollection of the witness, or for impeachment') (emphasis added); Porter v. Louisville & Nashville R.R., 202 Ala. 139, 142, 79 So. 695, 608 [sic] (1918) ('In no event could [the prior testimony] have been received as original evidence ..., nor do we assume that it was offered for that purpose') (emphasis added). Cf. Corona Coal & Iron Co. v. Callahan, 202 Ala. 649, 650, 81 So. 591, 592

> (1919) (in suit for malicious prosecution, it was reversible error to admit testimony from the underlying trial as original evidence); E. E. Yarbrough Turpentine Co. v. Taylor, 201 Ala. 434, 435, 78 So. 812, 813 (1918) (same); Thompson v. Richardson, 96 Ala. 488, 492, 11 So. 728, 729 (1892) (same). In the event a witness's inconsistent testi-mony may be considered for impeachment purposes only and not as independent or original evidence. See, Manning v. State, 217 Ala. at 359, 116 So. at 362; Kennedy v. State, 85 Ala. 326, 331, 5 So. 300, 301 (1888)."

Hooper v. State, _____ So. 2d at _____.

Even though the Court of Criminal Appeals applied the rule of evidence contained in these prior cases, that court, nevertheless, pointed out that the soundness of the rule had been questioned in Randolph v. State, 348 So.2d 858 (Ala.Cr.App. 1977), a case that was later described as documenting "wide-spread dissatisfaction with the traditional rule" and as citing cases and writings of many judges and scholars who "have

pressed for repudiation of the rule that prior inconsistent statements of a non-party witness have no substantive consequence in a present trial." Hooper v. State, ____ So.2d ____, quoting Gamble, Howard, & McElroy, The Turncoat or Chameleonic Witness: Use of His Prior Inconsistent Statement, 34 Ala.L.Rev. 1, 18 (1983), which also had cited Randolph.

It is apparent that the Court of Criminal Appeals felt constrained, and rightfully so, to follow this Court's earlier cases holding that prior inconsistent statements could never be used as substantive evidence.

The rule that this Court had previously set out is clear. The reason justifying that rule is that such evidence is "purely hearsay," but courts have found little difficulty in carving out exceptions to the hearsay rule in those many instances when the testimony, even though hearsay, is considered

to be credible enough to justify its presentation to a trier of fact.

It is clear to us that the modern trend is to allow a prior inconsistent state-ment to be used as substantive evidence, provided, of course, that the prior inconsis-tent statement was given under oath, was subject to the penalty of perjury, and was made at a trial, hearing, or other proceeding, or in a deposition. This modern trend is in line with Federal Rule of Evidence 801, which provides:

> "(d) Statements which are not hearsay. -- A statement is not hearsay if --
>
> "(1) Prior statement by witness. -- The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition...."

A number of states have adopted rules of evidence that include a rule substantially

similar to Rule 801(d)(1)(A), Fed.R.Evid.

Hooper suggests that this Court should not adopt such a rule of evidence but that if a rule similar to Rule 801(d)(1)(A) Fed.R.Evid., is desirable for Alabama, then the legislature is the proper body to adopt it. We find no limitation upon this Court's power to adopt the rule by Court decision, because this Court has broad powers to adopt rules of procedure. See Amendment 328, § 6.11, Constitution of Alabama, 1901. Other state supreme courts have by case law adopted rules similar to the federal rule. See State v. Almeda, 211 Conn. 441, 560 A.2d 389 (1989), and State v. Whelan, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994 (1986); Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982) (the Supreme Court of Georgia held that a prior inconsistent state-ment of a witness could be used as substan-tive evidence even though the prior statement was not made under

oath in a judicial proceeding or deposition, as the federal rule requires). The Georgia Supreme Court set forth some of the benefits from a rule allowing the use of prior inconsistent state-ments as substantive evidence:

> "We foresee these salutary effects:
>
> "(a) Once a declaration is made, both the State and the defense are accorded some measure of protection from the erratic or unpredictable witness, in that his declaration can be considered substantively where the witness appears and is subject to cross-examination, notwith-standing variant testimony from the stand.
>
> "(b) Similarly, both sides are assured a measure of protection against efforts to influence the testimony of a witness, as the prior declaration is no longer effectively revocable at the will of the witness.
>
> "(c) For the same considerations witnesses are protected from proper attempts to influence testimony--the potential gain from that impropriety being diminished

substantially by the adoption of this rule.

> "If, from all the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.' Judge Learned Hand, in DiCarlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925)."

248 Ga. at 864, 286 S.E.2d at 722 (emphasis original).

We should not be understood as expressing any view on the question of whether a prior inconsistent statement not made under oath can be used as substantive evidence when the declarant takes the stand and is subject to cross-examination. That question is not before us.

If this case had been tried in a federal court, it seems that the daughter's prior inconsistent statement would have been

admissible as substantive evidence under Rule 301(d)(1)(A), Fed.R.Evid. We think the federal rule is a good rule, that it does not substantially prejudice the rights of a defendant to a fair trial, and that it fosters a search for the truth.

We think that it is time that this Court changed our rule; therefore, after examining the record, considering the arguments of the parties, and reevaluating the rule against using prior inconsistent statements as substantive evidence, we hereby change that rule. We hold that a prior inconsistent statement of a witness who takes the stand and is available for cross-examination may be used as substantive evidence if the prior statement was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. All previous decisions of this Court to the contrary are hereby

overruled.

The judgment of the Court of Criminal Appeals is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hornsby, C.J., and Shores, Houston, and Steagall, JJ., concur.

Jones, Almon, and Adams, JJ., dissent.

ALMON, JUSTICE (dissenting).

If the defendant in fact committed the offenses for which he has been convicted, his conduct is most certainly both legally culpable and morally reprehensible. It is because of the emotional reaction that such acts engender, coupled with our natural zeal to protect children and to punish those who harm them, that courts must be especially careful to remain objective when presiding over or reviewing cases of this nature. The question before us, however, is whether the State has presented legal evidence that can be considered in determining whether the State has met its burden of proof beyond a reasonable doubt. If the earlier, now recanted, testimony is "substantive evidence," a case can be submitted to the jury on that testimony alone. The rule announced by the majority is not limited to sexual offenses and will apply to all criminal prosecutions, and,

for that matter, to all civil actions.

The rule prohibiting the use of prior inconsistent statements as substantive evidence, which the majority does away with in its opinion, has been a fundamental part of the accused's right to a fair trial for over 100 years. Because of the important constitutional aspects of the rule, I cannot agree with the majority's implication that it can be abolished as readily as a rule of procedure could be or as easily as a merely arbitrary rule of evidence. In addition, I do not agree that the now-abolished rule was based solely on the hearsay rule. It was also based on the accused's right to confront and thoroughly cross-examine witnesses against him, a right guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution and Art. I, § 7, of the Alabama Constitution. "While hearsay rules and the Confrontation Clause ... protect

similar values, it is quite a different thing to suggest ... that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law." California v. Green, 399 U.S. 149, 155 (1970).

Cross-examination has been called "the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, A Treatise on the System of Evidence in Trials at Common Law, § 1367, at 29 (3d Ed. 1940). Cross-examination must be an adversarial proceeding to be effective. Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967). The goals of cross-examination are best achieved by questioning the witness at the time the statement is made, in the presence of the same trier of fact who must ultimately assess the witness's credibility. The principal virtue of cross-examination "is in its immediate application of the testing process. Its

strokes fall while the iron is hot." State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939).

Under the change effected by the majority's opinion, the accused's opportunity to confront the witness against him in a face-to-face, adversarial proceeding, at the time the damaging statement is made, is destroyed. Instead, the accused is placed in the untenable position of cross-examining a now friendly witness regarding testimony given at a time when the witness was hostile. Instead of trying to impeach the witness's present testimony, the accused must, instead, attempt to mitigate the impact of the witness's prior statement, while at the same time trying to make the witness's present testimony appear credible. The near-impossibility of this undertaking has been recognized by the Michigan Supreme Court:

> "No matter how deadly the thrust of the cross-examiner, the ghost of the prior state-ment stands.

> His questions will always sound like attempts to permit the witness to explain why [she] changed [her] story before coming to court, with the jury being left to infer that [she] might have been induced to change [her] story in the intervening months or years, for some unrevealed and sinister reason."

Ruhala v. Roby, supra, 379 Mich. at 128, 150 N.W.2d at 158.

An additional problem created by allowing prior inconsistent statements to be used as substantive evidence is that the jurors are unable to adequately assess the witness's credibility by observing her demeanor at the time the prior statement was given. Instead, they must rely on the reading of a cold written record. That is simply not sufficient. As noted by Judge Learned Hand, "the bearing and delivery of a witness will usually be the dominating factors" in determining the witness's credibility. NLRB v. Universal Camera Corp., 190 F.2d 429, 430

(2d Cir. 1951).

The perjury question is also very troubling. If a witness testifies that a traffic light was red and then testifies that it was green, what probative effect should the law give to that witness's testimony? In mathematics when you add +1 and -1, the answer is 0. How can a nullity add any weight on the "guilty" side of the scales of justice? While we are not dealing with mathematics, I am nevertheless concerned that this kind of self-contradictory testimony can be used to overcome the presumption of innocence.

For the foregoing reasons, I must dissent.

Jones and Adams, JJ., concur.

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

RE: 89-1314

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: John Edward Hooper

vs.

State)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

Application for rehearing overruled. No opinion written on rehearing.

Maddox, J. - Hornsby, CJ., Shores, Houston, Steagall and Ingram, JJ., concur; Adams, J., dissents.

02/08/91

Robert G. Esdale, Clerk
Supreme Court of Alabama

SUPREME COURT OF THE
UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC

RE: 90-1742

John Edward Hooper
v.
State of Alabama

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

6/24/91

William K. Suter, Clerk
Supreme Court of
United States

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THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF
CRIMINAL APPEALS

OCTOBER TERM 1990-91

3 DIV 91

John Edward Hooper

v.

State

Appeal from Escambia Circuit Court
CC-85-62

AFTER REMAND BY ALABAMA SUPREME COURT

BOWEN, JUDGE

John Edward Hooper was convicted of two counts of second degree rape and was sentenced to five years' imprisonment on each conviction. On original submission of this appeal, this Court reversed those convictions, addressing only two of the nine issues raised. Hooper v. State, [Ms. 3 Div. 91, March 30, 1990]

____So.2d____ (Ala.Cr.App. 1990). Our decision was reversed by the Alabama Supreme Court. Hooper v. State, [Ms. 89-1314], December 14, 1990] ____So.2d____ (Ala. 1990). In this opinion on remand from the Alabama Supreme Court, we now address all of the issues raised by the appellant on original submission.

I.

In Hooper v. State, [Ms. 89-1314, December 14, 1990] ____So.2d____, ____ (Ala. 1990), the Alabama Supreme Court "changed [the] rule" in this state and held "that a prior inconsistent statement of a witness who takes the stand and is available for cross-examination may be used as substantive evidence if the prior statement was given under oath subject to the penalty of perjury at a trial, hearing, or other

proceeding, or in a deposition."

Therefore, the trial court did not err in instructing the jury that the testimony of the prosecutrix given at the prior trial of the appellant for this same offense could be considered as substantive evidence.

II.

Our finding, on initial submission, that the evidence was insufficient to sustain the appellant's conviction was based on our application of existing law. We held that "the only evidence incriminating Hooper was the prosecutrix's prior inconsistent testimony and her prior inconsistent statements made to a school counselor, a social worker, and three of her friends." Hooper v. State, [Ms. 3 Div. 91, March 30, 1990] ____So.2d____, ____ (Ala.Cr.App. 1990) (emphasis omitted).

On certiorari review, the Alabama Supreme Court "changed the rule" so that the prosecutrix's prior inconsistent testimony given at the appellant's first trial was admissible as substantive evidence.

At the first trial, the prosecutrix testified that the appellant had sexual intercourse with her when she was 13 years old and that those acts occurred in Escambia County. This prior testimony was admitted into evidence at the appellant's second trial. A conviction for rape may be had on the uncorroborated testimony of the prosecutrix. Boddie v. State, 52 Ala. 395, 398-99 (1875). Therefore, the appellant's conviction is supported by the evidence.

III.

The appellant contends that the trial

court abused its discretion in calling the prosecutrix as the court's witness.

Prior to the second trial, the prosecution moved to have the prosecutrix declared hostile and called as a court witness due to the fact that she had recanted her prior testimony incriminating the appellant. The trial court granted that motion and called the prosecutrix as a court witness.

At trial, the prosecutrix was the first witness. She was called by the trial court and the trial judge briefly examined the prosecutrix regarding her name, age, her date of birth, the age of the appellant (which the prosecutrix did not know), and her denial that the appellant engaged in sexual intercourse with her. The prosecutor was then allowed to cross-examine the prosecutrix.

A trial court, in the exercise of its sound discretion, and being careful to maintain an attitude of impartiality, may call a witness as a court witness, may examine such witness, and may permit that witness to be cross-examined by both the prosecution and the defense. Kissic v. State, 266 Ala. 71, 74-75, 94 So.2d 202, 205 (1957).]

Here, the trial court specifically stated:

> "The court is going to make every effort to ensure that the jury understands that they are not to give any more credence to that witness [the prosecutrix] or take any significance from the fact that the court calls her as a witness in this case. I'm going to do everything I can to prevent them from thinking that I am an arm of the prosecution or the Attorney General's office or any other agency. I want to do everything I can to make [and] maintain a neutral position as best I can and to somehow try to see that whatever evidence needs to come out

to get to the truth of
the matter comes out. That's
the only purpose of this
court is to see that the
truth is brought out."

The record contains no indication that the trial court did not maintain an attitude and demeanor of impartiality. The record furnishes no reason to believe that the trial court abused its discretion. See Wade v. State, 50 Ala. 164, 166 (1874).

State's witnesses S.M. and M.L. were friends of the prosecutrix. Each testified to complaints made by the prosecutrix to them about the appellant's sexual molestation. The trial court refused to allow defense counsel to cross-examine either witness about whether she had been a victim of sexual abuse. Defense counsel made an offer of proof that each witness had been sexually abused by someone other

than the appellant, and argued that each witness was biased against the appellant for that reason. Counsel also argued that the prosecutrix made her complaints to these witnesses because they had been victims of sexual abuse. The trial court sustained the State's objection and held that "there's got to be more of a direct link to show bias toward this defendant, like something that occurred between them."

"[A] party is given wide latitude on cross-examination to test a witness's partiality, bias, or interest." Perry v. Brakefield, 534 So.2d 602, 608 (Ala. 1988). The rule in this state, notwithstanding the general principle concerning the development of the interest or bias of a witness, is that the range of cross-examination rests largely in the discretion of the trial

court and that the court's rulings will not be disturbed unless it clearly appears that the defendant was prejudiced by the rulings. However, "where the witness' testimony is important to the determination of the issues being tried, there is little, if any, discretion in the trial judge to disallow cross-examination on matters which tend to indicate the bias of the witness." Wells v. State, 292 Ala. 256, 258, 292 So.2d 471, 473 (1973).

> "It is always competent on cross-examination to make such interrogation of a witness as would tend to test his interest bias, or prejudice, or to illustrate or impeach the accuracy of his testimony. Both our appellate courts have approved the principle stated in 2 Wigmore on Evidence, 2d Ed., Section 949, p. 232: 'The range of external circumstances from which probable bias may be inferred is infinite. Too much refinement in analyzing their probable effect is out of place.' Louisville & N.R. v. Martin, 240 Ala. 124, 193 So. 141,

144; Sowell v. State, 30 Ala.App. 18, 199 So. 900. And for emphasis we repeat the oft-stated rule that the latitude and extent of such cross-examination is a matter which of necessity rests largely within the sound judicial discretion, which will not be revised on appeal except in extreme cases of abuse. Such cross-examination may even pertain to irrelevant and immaterial matters as bearing on the memory, accuracy, credibility, interest, or sincerity of the witness."

Housing Authority of City of Decatur v. Decatur Land Co., 258 Ala. 607, 612, 64 So.2d 594, 598 (1953). "'[T]he extent to which a witness may properly be cross-examined as to collateral cirmumstances for the purpose of showing bias depends in some instances upon the importance of his testimony, and especially upon whether such testimony is of a nature to be seriously affected by prejudice, bias, or hostility.'" Louisville & N.R. v. Martin, 240 Ala. 124, 131, 198 So. 141, 147 (1940)

(emphasis in original)_. "[I]t is an abuse of discretion and a violation of constitutional rights to deny to a defendant the right to cross-examine a witness at all on a 'subject matter relevant to the witness' credibility', such as the witness' possible motive for testifying falsely." United States v. Brown, 546 F.2d 166, 169 (5th Cir. 1977). See Stinson v. State, 41 Ala.App. 575, 576, 142 So.2d 897, 898, cert. stricken, 273 Ala. 479, 142 So.2d 899 (1962) (State properly allowed to cross-examine wife, who testified for defendant-husband, as to whether she had previously been convicted for same offense of which defendant stood accused.). "We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in

otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' Davis v. Alaska, [415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974)]." Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986).

We find that the trial court erred, at least with regard to S.M., in not allowing defense counsel to cross-examine that witness about whether she had ever been sexually abused. The fact that a prosecution witness has been a victim of sexual abuse is a matter which may tend to bias that witness against a defendant charged with the rape of his

daughter. We find this conclusion inescapable in light of the fact that two veniremembers were excused for cause based on their admitted prejudice caused by the fact that one veniremember had been raped and the minor daughter of another member had been raped.

In qualifying the jury venire, the trial court asked, "Have you been or has any member of your family ever been the victim of rape or any sexual abuse?" Two veniremembers indicated that they had been sexually abused and that their experience either would or might influence their verdict. The trial court granted the appellant's challenge for cause, without objection from the prosecution, to these two veniremembers.

However, under the circumstances of this case, we find that that same error was harmless because the fact that the

prosecutrix made complaints to her two friends was corroborated by other witnesses, and because other witnesses testified to the fact that the prosecutrix had made complaints to them.

The prosecutrix admitted to having made complaints to T.T. and M.L., but denied ever discussing the matter with S.M. Sixteen year old T.T. testified that on several occasions, the prosecutrix told her that the appellant had sexually abused her. Mrs. Carol Middleton, a guidance counselor at the school the prosecutrix attended, testified that she talked to T.T., M.L., and the prosecutrix together in her office, and at that time, the prosecutrix stated that she had been sexually abused by the appellant. Ms. Amelia Davis, a licensed social worker, testified that the prosecutrix told her

that she had been sexually abused by the appellant. Ms. Amelia Davis, a licensed social worker, testified that the prosecutrix told her that she had been sexually abused by the appellant. Ms. Davis also testified that the prosecutrix told her that she had told S.M., M.L., and T.T. that she had been sexually abused by the appellant. Clinical psychologist, James F. Chudy, testified that the prosecutrix told him that she had been sexually abused by the appellant. Dr. Jimmy Adkisson, a physician who examined the prosecutrix, testified that the prosecutrix gave him a history of sexual abuse.

Furthermore, a close reading of the trial testimony of S.M. reveals that she indicated that she had been sexually abused. Although the trial court sustained the State's objection, Ms. M.

did testify that it was not the appellant that molested her. In addition, the prosecutrix testified on cross-examination by defense counsel, that Ms. M. told her that she had been sexually abused by her uncle.

The prosecutor represented to the court that M.L. denied ever being sexually abused.

Although we are extremely reluctant to hold that any improper limitation of cross-examination constitutes harmless error, we are convinced beyond any reasonable doubt that the error in this case did not contribute to the verdict of the jury. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Violations of the confrontation clause of the Sixth Amendment are subject to harmless error analysis. Delaware v. Van Arsdall, 475

U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

> "[W]e hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman [v. California, 386 U.S. 18], harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might, nonetheless, say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. Those factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case."

Van Arsdall, 475 U.S. at 684, 106 S.Ct. 1438.

Here, the testimony of S.M. and M.L. was not that significant in consideration of the fact that other witnesses testified that the prosecutrix had told them that she had been sexually abused by the appellant, and the fact that the prosecutrix did complain to both witnesses was corroborated by other witnesses. Other than with regard to the past sexual abuse, defense counsel was allowed a thorough and sifting cross-examination of witnesses, S.M. and M.L. Finally, despite the fact that the prosecutrix recanted her prior testimony incriminating the appellant, the strength of the State's case is impressive.

For these reasons, we find that the improper infringement of the appellant's right of cross-examination constitutes harmless error.

V.

On cross-examination of the prosecutrix, who was called as the court's witness, the State elicited her prior testimony that, when she was 13 years old, the appellant had sexual intercourse with her on September 6, 1984, and December 13, 1984, the dates specifically averred in the indictment. In addition, the prosecutor elicited the prosecutrix's prior testimony that the appellant had been sexually abusing her since she was "[a]bout five. Between five and seven [years old]" when the appellant "put his hands on the private parts of [her] body." The prosecutrix also testified that "[a]bout seven he started trying . . . to penetrate me but until I was nine, he couldn't." She stated that after the age of nine, the appellant had sexual intercourse with

her "about every week," and when she was 12 or 13 "it increased more." She stated that at the time of those two incidents she was 13 years old. The appellant argues that this additional testimony constitutes inadmissable evidence of collateral criminal acts not charged in the indictment.

We hold that this testimony of the prior sexual misconduct between the appellant and the prosecutrix was properly admitted into evidence.

> "[W]here . . . a defendant is charged with the first degree rape of his minor daughter, evidence establishing that he had raped and/or committed acts of sexual abuse toward her prior to or subsequent to the offense for which he is charged, is admissible to prove his motive in committing the charged offense. Such evidence tends to establish the inducement (i.e., unnatural sexual passion for his child) that led him to rape or molest her."

Bowden v. State, 538 So.2d 1226, 1235 (Ala. 1988) (emphasis in original).

VI.

The appellant was first tried and convicted in September, 1985. That conviction was reversed because of the prosecutor's improper cross-examination of character witnesses for the appellant. Hooper v. State, 523 So.2d 469 (Ala.Cr.App. 1986). The appellant was retried and convicted in September of 1988. The appellant argues that, at his second trial, the trial court erred in allowing the prosecution to impeach the prosecutrix with her prior inconsistent answer to the question, "Have you ever had oral sex with your father?" without establishing a proper predicate.

At the second trial, on cross-examination of the prosecutrix by the prosecutor, the following occurred, and,

for the first time during the course of the trial, defense counsel objected on the ground of improper predicate for impeachment:

> Q. Now, let me ask you this, K____, today. You don't have to look at the record. Have you ever had oral sex with your father?
>
> A. No, sir.
>
> Q. Look at page R-82 of the record [of her testimony at the first trial]. Mr. Rebarchek [the prosecutor at the first trial] says, --
>
> MR. HARDEN [defense counsel]: Judge, I'm going to object. He's not laying the proper predicate to elicit prior inconsistent statements.
>
> THE COURT: You want to elaborate?
>
> MR. HARDEN: Yes, sir.
> There's a certain procedure that Mr. Valeska [the district attorney] has got to go through in order to elicit -- He cannot just start reading from the transcript. He's been doing that throughout this trial, Judge.
>
> MR. VALESKA: I asked her about it, if she ever had oral sex with him. She answered, not from the transcript, she

answered no. Then I called her to the transcript.

MR. HARDEN: It's not proper. It's not a proper foundation laid for eliciting impeachment testimony from a prior inconsistent statement.

THE COURT: I overrule the objection.

MR. HARDEN: We except.

MR. VALESKA: Go to page R-82, K___.

A. Yes, sir.

Q. Question: 'When did you see that?'

A. 'When he had oral sex with me.'

Q. Question: 'Could you describe it for us, please?'

A. 'White syrupy liquid that came out of his penis.'

Q. MR. VALESKA: Question: 'Did you ever get any of that on you?'

MR. HARDEN: We are going to move for a mistrial on the grounds that he has elicited testimony of an impeachment nature without laying proper predicate for impeachment. It's prejudicial. It has come in over proper objection. We move for a mistrial.

THE COURT: Okay. Would counsel approach the bench.

Immediately after this exchange, the

trial recessed for lunch. Upon return, the trial court stated:

> "The defense prior to breaking for the noon hour made an objection which the court did not rule upon. The court has considered it during the noon hour. The court is going to sustain the objection as made by the defense regarding the method of impeaching this witness."

"To impeach a witness with prior inconsistent statement, counsel must ask [the witness] specifically aobut the statement at issue, with reference to the time and place at which he allegedly made it and the person to whom it was made, and give [the witness] an opportunity to admit or to deny having made it." Perry v. Brakefield, 534 So.2d 602, 606 (Ala. 1988); accord, C. Gamble, McElroy's Alabama Evidence Section 157.01 (3d ed. 1977). However, "perfect precision in the predicate question with respect either to the

content of the supposed statement, the time when, the place where, or the person to whom made [is not required]. The rule is not ironclad and perfection is not required." McElroy's Section 157.01(3) (footnotes omitted).

While the district attorney did not establish the predicate he should have established before impeaching the prosecutrix with her prior testimony, we consider that error harmless under the facts of this case. Everyone, including the prosecutrix, understood that the district attorney was using the prior testimony given by the prosecutrix to impeach her testimony. It was undisputed, even before the prosecutrix took the witness stand, that she was going to recant her prior testimony and deny that the appellant had ever sexually abused her. At the very

beginning of his cross-examination of the prosecutrix, the district attorney established that she remembered testifying under oath "in this courtroom back in 1985." The district attorney handed the prosecutrix "a copy of your testimony back in 1985" and asked her to "take a minute and look at it." Then the district attorney cross-examined the prosecutrix for 60 pages in the transcript before defense counsel objected on the ground that there was no proper predicate being laid. While these facts do not justify the prosecutor's disregard of the rule requiring a proper predicate for impeachment, it certainly renders that error harmless in this case. A consideration of the reason for the rule reveals that there was no unfairness to the prosecutrix-witness in this case.

"The basic reason for the requirement that the predicate question specify time, place, content of the supposed statement, and the person to whom made, is to enable the faculties of the mind of the witness to be put in motion and his memory aided by the train of ideas which such circumstances would be likely to suggest with reference to the subject matter under inquiry and thereby be aided in recalling to memory whether he had made the statement; and, if he recalls making it, to give his explanation of the apparent conflict between his testimony and such prior statement." McElroy's Section 157.01(2).

VII.

The appellant argues that he was prejudiced by the admission of three XXX-rated video tapes, which were admitted for identification purposes only, where the State failed to show that the contents of the tapes were in substantially the same condition as at the time they were viewed by the appellant and the prosecutrix, and where the State failed to establish a proper

and continuous chain of custody of the video tapes.

The prosecutor elicited the prosecutrix's prior testimony that she had watched X-rated films depicting "very, very explicit sex"; that she watched these films with the appellant in the appellant's bedroom; that the appellant told her that if she ever ran away, she would have to do things like those that appeared in one of the films about a girl who ran away and was raped; and that after they watched the films, she and the appellant "usually had sex."

State's exhibits 1A and 1B, 2A and 2B, and 3A and 3B are the video tape containers and the actual pornographic video tapes. At trial, the prosecutrix admitted that she had watched videos 2B and 3B by herself, and the prosecutor elicited her prior testimony that she

had watched the three videos with her father. The prosecutor also elicited the prosecutrix's prior testimony that the appellant told her the videos came from Don Champion who put in their satellite dish.

State's witness Donald Champion identified the three videos as being ones he had owned. He testified that he had watched "parts" of each tape. To the best of his memory, he lent tape 1B to the appellant, and testified that it was "very possible" he had lent tape 2B to the appellant, although he was not certain. He testified that he did lend three X-rated tapes to the appellant while he was a state trooper in Evergreen, around the time he sold a satellite system to the appellant in March, 1984. As best Champion could remember, those three tapes were among

the seven or eight tapes he gave to Alabama State Trooper Captain L. N. Hagan. He did not know if the appellant made any changes or alterations to the tapes.

Captain Hagan testified that he obtained seven video tapes from Champion in January 1985, and that the three videos marked for identification at trial contained material which the prosecutrix had described to him as having seen on videos at her house with the appellant.

The appellant testified in his own defense at trial. He admitted that he got three video tape recordings from Chapman and that he took them to his residence. However, he testified that he watched only about 15 or 20 minutes of one tape before he discovered the pornographic nature of the tapes, that

he did not view any tape with his daughter, the prosecutrix, and that he returned the tapes to Chapman.

Although marked for identification, the video tapes and their containers were never admitted into evidence. Although several witnesses described the contents of various limited portions of the tapes, the contents of those tapes were not viewed by the jury.

"'[A] proper foundation laid for the accuracy of what the [video tape] portrays obviates the need to establish a chain of custody to demonstrate its authenticity.'" Molina v. State, 533 So.2d 701, 712 (Ala.Cr.App.1988), cert. denied, 489 U.S. 1086, 109 S.Ct. 1547, 103 L.Ed.2d 851 (1989). Since the contents of the video tapes were not observed by the jury and the video tapes themselves were not introduced into

evidence, the error in the failure of the prosecution to lay a proper predicate for the admission of those tapes does not constitute a ground for reversal of his conviction.

VIII.

The appellant argues that he was denied a fair trial because of the admission of the evidence of the pornographic video tape recordings.

In a single indictment the appellant was charged with two counts of the second degree rape of his daughter. Count One charged that the sexual intercourse occurred "on or about September 7, 1984." Count Two charged that the sexual intercourse occurred "on or about December 13, 1984." In Part V of this opinion, this Court upholds the admissibility of the prior testimony of the prosecutrix that the appellant had

sexually abused her since she was five years old and had had sexual intercourse with her since she was nine years old.

The prosecutor elicited the former testimony of the prosecutrix that "sometime" during the summer of 1984 she and the appellant watched the pornographic video films in the bedroom of her parents' residence in Atmore, Alabama. According to the prosecutrix's prior testimony, the appellant told her that "if [she] ever run away there was a film about a girl who run away. He told [her that she would] have to do things like that. * * * These men were making her have sex with them." According to the prosecutrix, these films portrayed "very, very explicit sex. * * * Just mostly that people were having sex, really. * * * The girl that ran away and the men had picked her up

off the street and took her and made her have sex with them. And one of them was a real short guy who was having sex with this lady. And one of them was like a TV show, were on TV or something." In one of the films, a man in a dress "put whipped cream on [a woman's] breasts and licked it off. And she put the whipped cream on his penis * * * [and] she licked the whip cream off his penis." The prosecutrix testified that after they watched these films, they "usually had sex." She stated that she and the appellant did "not very often" watch the films.

There is no doubt that the admission of the evidence that the appellant had pornographic video tape recordings in his possession was prejudicial to his case. However, that evidence was admissible and was properly presented as

a part of the State's case in chief. "If the accused's commission of another crime is admissible in a present prosecution, the State may prove in meticulous detail the manner in which the accused committed such other crime." McElroy's Section 69.02(8). In our opinion, the probative value of the evidence of the pornographic video tape recordings and the fact that they were in the appellant's possession linked the appellant to the crimes charged and outweighed the probable prejudicial impact upon the jury of those tapes.

IX.

The appellant complains that the prosecutor cross-examined the prosecutrix in such a manner as to imply the existence of a factual predicate which was not supported by the evidence.

From the record:

Q. [prosecutor] Approximately in February of 1986, did you have a phone conversation with your father when Lynn Manz was present or listening in?

A. [prosecutrix] No, sir.

Q. All right. In that conversation in approximately February, 1986, with Lynn Manz listening either on the intercom, which you punched in yourself for them to hear it, or her listening on another phone, did you say to your father these words or these words in substance: "Daddy why did you do that"; and his response to you was: "K_____, you made me do it. You wanted it as much as I did."

A. No, sir.

MR. HARDEN: Judge, if it please the Court, I am going to object unless he lays the proper foundation to show whether she had knowledge whether somebody was listening in.

MR. VALESKA: We are going to call those witnesses. I just had to lay the predicate.

MR. HARDEN: We object to this witness testifying.

THE COURT: I overrule the objection. I believe she has already answered.

MR. HARDEN: We except.

The prosecutor did not pursue this

line of cross-examination with the prosecutrix. However, Lynn Manz was not called as a witness and did not testify at the appellant's trial.

Initially, we note, as did the trial court, that defense counsel made his objection only after the prosecutrix had answered the question. "[O]bjection to a question must be made as soon as a question is stated, unless its inadmissibility is due not to the subject of the question but something contained in the answer." Willingham v. State, 261 Ala. 454, 458, 74 So.2d 241, 244 (1954).

"'"It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner knows he cannot support by the evidence."'" Gillespie v. State, 549 So.2d 640, 644 (Ala.Cr.App. 1989);

(Ala.Cr.App. 1989); accord, Wysinger v. State, 448 So.2d 435, 438 (Ala.Cr.App. 1983). "Where the prosecutor insinuates the existence of a fact which the witness denies, the prosecution 'may have a duty to complete its impeachment of the witness or show that the prosecutor had "evidence of or reasonable ground to believe the truth of its implication."'" Gillespie, 549 So.2d at 647. Df. Ex parte Peagler, 516 So.2d 1369, 1371 (Ala. 1987) ("'When a witness denies that he has been convicted of the crime, it becomes incumbent upon the impeaching party to prove the conviction.'")

To the extent to which this was an attempt by the prosecutor to get before the jury evidence for which he had no basis, it must be condemned. However, there appears to have been some basis at

least for a similar statement. Prosecution witness Sally E."Betsy" Aust testified that she was employed as a house parent of a residential mental health care facility called Turning Point. On January 22, 1986, she overheard a telephone conversation between the appellant and the prosecutrix. She testified:

> "To the best of my memory [the prosecutrix] said, 'You realize why I can't go home.' She hit the [microphone] button and his voice came over saying, 'I said I wouldn't do that again.' And she hit the mike button off and replied again, 'You've said that before.' That's the best of my memory what."

Ms. Aust testifed that she thought there was another staff person present who overheard this conversation but she could not identify that person. The prosecutor elicited the prior testimony of the prosecutrix that her "parents had

made me feel that it was my fault that all this had happened."

Furthermore, in our review of the record we have not found that the specific objection to the prosecutor's question now raised on appeal was presented to the trial court. "The statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial." Ex parte Frith, 526 So.2d 880, 882 (Ala. 1987).

At the time the prosecutor asked the question, the trial court acted within its discretion in overruling defense counsel's objection:

> "When the admissibility of a particular item of evidence hinges upon proof of other facts, the court may, in its discretion, allow the evidence upon the proponent's promise to 'connect it up.' C. Gamble, McElroy's Alabama Evidence

> Section 13.01 (3d ed. 1977). If the promised proof is not later presented, however, the party objecting to the introduction of the evidence should move for its exclusion. Henry v. Frochlichstein, 149 Ala. 330, 43 So. 126 (1907); E. Cleary, McCormick on Evidence Section 58 (2d ed. 1972)." Donahoo v. State, 505 So.2d 1067, 1072 (Ala. Cr.App. 1986).

Here, defense counsel never objected on the ground that the prosecutor could not prove or had no factual basis for his question. Although the prosecutor stated that he was "going to call those witnesses," defense counsel never moved to have the testimony of the prosecutrix stricken.

Therefore, this specific issue was not preserved for review on appeal.

The judgment of the circuit court is affirmed.

AFFIRMED.

All Judges concur.

flatly denied that Hooper had committed the acts with which he was charged. Hooper then made a motion for judgment of acquittal, which was denied. The State was thereafter permitted to cross-examine the prosecutrix with respect to her testimony at the first trial. In this manner the State elicited that the prosecutrix had previously testified that Hooper did engage in sexual intercourse with her on the dates alleged in the indictment. The State also elicited the prosecutrix's testimony from the first trial concerning the details of these acts and other sexual acts between her and Hooper.

At the second trial, a school counselor, a social worker, and three friends of the prosecutrix testified that the prose-cutrix had told them that Hooper had engaged in sexual intercourse with her. A clinical psychologist, who had interviewed the prosecutrix only once, was called by the State and testified that the

prosecutrix exhibited characteristics of a sexually abused child. There was no eyewitness testimony and the medical evidence indicated only that the prosecutrix's physical condition was consistent with having engaged in sexual intercourse.[2] At the second trial, the only evidence incriminating Hooper was the prosecutrix's prior inconsistent testimony and her prior inconsistent state-ments made to the counselor, the social worker and the three friends.

Hooper's renewed motion for judgment of acquittal, made after the prosecution rested, was denied by the trial court. In his defense, Hooper denied raping or other-wise sexually molesting his daughter.

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[2] The prosecutrix testified at the second trial that, prior to 1985, she had had sexual intercourse three or four times with one of her brother's friends. This friend was called as a prosecution witness and denied having ever engaged in sexual intercourse with the prosecutrix.